No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation),
Plaintiff in Error,

vs.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM M. CANNON,
Attorney for Defendant in Error.

Filed this .....day of November, 1914.

FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation),
Plaintiff in Error,

vs.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

In the statement of the case in the brief of plaintiff in error there are certain inaccuracies. Referring to the duties of the "missed-hole" man, Yokum, it is said that it was his duty to examine the face of the drift or cross-cut *as far down as the accumulation of muck at the bottom of the same* would permit. On this subject the evidence is conflicting, plaintiff's evidence showing that it was

Yokum's duty to examine the whole face of the drift (Record, pp. 61, 78, 79, 103).

It is also stated that it was not Yokum's duty to examine below the pile of muck for missed shots. On this subject, as before stated, there was a conflict, plaintiff's evidence being that it was Yokum's duty to examine the entire face of the drift after the muck had been removed (Record, pp. 61, 79, 103).

It is asserted that in the face of the cross-cut, one round of holes had been drilled and blasted, breaking the rock out to a depth of three or three and one-half feet. On this question there is a conflict, plaintiff's evidence being that the round of holes under consideration marked the beginning of the cross-cut (Record, pp. 53, 56, 59, 65, 68).

Statement of the Case.

It will be the purpose of defendant in error to state herein only such facts as are not sufficiently covered in the brief for plaintiff in error.

In the mine where the accident occurred there were about fifty faces where blasting operations were ordinarily carried on (p. 76). It was the practice to drill about a dozen holes and then explode them at the end of a shift (pp. 49, 57, 58, 62, 68). The foreman would direct the machine man and chuck tender where to drill the holes (pp. 49,

52, 58). If a round of holes was not completed in one shift the next shift would take up the work, and so on, until the round was finished (pp. 59, 68).

After the round of holes was exploded it became the duty of the "bar-down" man to bar down the loose rock in the face of the drift which had not already fallen, after which it was the duty of the muckers to remove the loose rock resulting from the blasts (pp. 52, 76, 77).

There was also provided a "missed-hole" man, whose duty it was to examine the face of the drift after the explosion of a round of holes for the purpose of discovering "missed holes", that is, unexploded charges of dynamite (pp. 48, 49, 61, 77, 79). The practice was for the "missed-hole" man to spend as much of his time as was necessary in looking for "missed holes" and to shoot them when found (p. 78). At the time of the accident Yokum was acting both as "bar-down" man and "missed-hole" man (pp. 52, 57, 60, 71).

After the removal of the muck and the examination by the "missed-hole" man, the foreman would, when convenient, set a crew at work drilling another round of holes (p. 53). No crew worked in any definite place steadily (pp. 52, 57, 69). One crew might work on one face for one shift and in another part of the mine the next shift (pp. 57, 69). Where the men worked depended altogether upon the pleasure or discretion of the foreman and shift boss (pp. 49, 52, 58).

At the time the accident happened one Hall was the foreman and one Meyers the shift boss (p. 48). It was their practice to commence their work at opposite ends of the mine, setting the crews at work and gradually coming together near the center of the mine, thus covering the entire ground (p. 94).

On the night in question Fred Whitsett and his brother Frank were set to work completing a round of holes for the cross-cut (pp. 66, 68). During the previous night (their first shift) they had drilled five holes (p. 59). The succeeding crew drilled several more and there were still two or three holes to be drilled when Fred and Frank went on shift again (p. 59). At that time, about two hours before the accident happened, there was a hole already started (p. 66). The foreman, Hall, assisted the boys to set up their machine and directed them to continue drilling the hole which was already begun (pp. 65, 66, 90). After some delay in getting the proper drills they commenced to follow their instructions, and, after drilling several minutes, an explosion of a "missed hole" occurred, resulting in the death of Frank and the serious injury of Fred (pp. 66, 70).

Yokum testified that he had examined this face down to the muck, which lay scattered around on the bottom of the tunnel, but made no examination after all the muck had been removed (p. 103). He was present at the face about the time the boys were

set at work and then had an opportunity to examine the whole face of the drift for "missed holes", but at that time made no examination at all (p. 103).

There was a conflict in the testimony as to whether it was the duty of the machine men and chuck-tenders to look for "missed holes" (pp. 112, 113, 114, 75). Witnesses for plaintiff in error say that it was their duty, but admit that they never gave either Frank or Fred Whitsett instructions to that effect (pp. 77, 80, 81, 112, 113, 114). The evidence for defendant in error is to the effect that the "missed-hole" man was employed for that specific purpose, and that no duty devolved on Fred or Frank to do that for which the "missed-hole" man was employed (pp. 71, 112, 113, 114).

Candles were used by the miners and "missed holes" were much easier of discovery in the upper part of the face than near the bottom of the drift (pp. 59, 79).

When the foreman set the boys at work to complete the hole already commenced he made no inspection of the face of the drift to discover "missed holes" (pp. 92, 93).

It appears, therefore, that no representative of the employer made any careful examination of this particular face for missed holes. Yokum, the "missed-hole" man, made a casual examination of a part of the face before the removal of the muck, but although he was there after all the muck had

been removed he made no further examination. The foreman made no examination at all, but set the boys at work completing a hole already started. This work set off the unexploded blast, causing the injury and death complained of.

It is the contention of defendant in error, leaving out of consideration the question of the competency of Yokum, that there was ample evidence to show that Frank and Fred Whitsett were negligently set to work in a place where death or serious injury was almost certain to result from carrying out the employer's specific instructions.

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

There was no misconduct of counsel for defendant in error. If the president of the indemnity company which had indemnified plaintiff in error against liability for personal injuries or death had been called as a juror it would have been impossible to disqualify him unless it were shown, (1) that he was such president, and (2) that his company had indemnified the plaintiff in error against loss. In order to elicit these facts appropriate questions would have to be propounded to the juror. The questions complained of were merely for the purpose of eliciting information of that kind. Upon

objection being made by counsel for plaintiff in error the court asked Mr. Cannon, counsel for defendant in error, to state the purpose of the question. This was done solely in compliance with the court's request, and the court allowed the inquiry and at the same time instructed the jury to pay no attention to anything of that kind. There was certainly no error or misconduct here. The matter was a pertinent one to be inquired into and was handled as delicately as possible. It was not claimed at any time that the answers of the juror or statements of counsel were evidence in the case. Jurors are presumed to be men of ordinary intelligence, and it should certainly be assumed that they did not take as evidence what clearly was not evidence.

Considering the nature of the evidence the verdicts in both cases were exceedingly small. The evidence in the Fred Whitsett case would have justified a verdict for three times the amount. The verdict in the Reardon case was much less than is ordinarily given in death cases. The smallness of the verdicts clearly indicate that the jury was not influenced in any way by passion or prejudice. Notwithstanding the fact of the interest of the indemnity company, the plaintiff in error was dealt with most tenderly by the jury.

A further complete answer to the contention is that the plaintiff in error never requested the court to instruct the jury to disregard any statements of counsel on questions asked the jurors. The court

virtually instructed the jury at the time to disregard the statements as evidence and indicated its willingness to give a further instruction later. Counsel had no right to rely upon the court giving this instruction of its own motion. Counsel prepared and proposed a large number of instructions, but studiously omitted to ask an instruction on this subject. Consequently he cannot now be heard to complain.

Hodge v. Chicago etc. R. Co., 121 Fed. 48;
Frizzell v. Omaha St. R. Co., 124 Fed. 176;
Lindsey v. Testa, 200 Fed. 124;
Texas etc. Co. v. Watson, 112 Fed. 402; judg. aff. 190 U. S. 287.

II.

THE FOURTH ASSIGNMENT OF ERROR.

At the opening of the trial counsel for plaintiff in error "moved the court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint". The motion was denied.

The gravamen of the cause of action in these cases is the injury in the one case and the death in the other. Whether the injury or death was caused by one negligent act or omission or by several acts or omissions operating together to produce the result, is immaterial. The mere fact that plaintiff in error may have been guilty of two distinct acts

of negligence does not give rise to two separate and distinct causes of action. There is only one cause of action in such case, namely, the injury in the case of Fred, and the death of Frank in the Reardon case.

Columb v. Webster Mfg. Co., 84 Fed. 592;
Smith v. Missouri Pac. R. Co., 56 Fed. 458;
Cross v. Evans, 86 Fed. 1;
Chobanian v. Washburn Wire Co., (R. I.) 80 Atl. 394;
Berube v. Horton, (Mass.) 85 N. E. 474;
Columbus v. Anglin, (Ga.) 48 S. E. 318.

If this be true there were no causes of action to separate, and therefore there could be no election. Moreover, the Code of Civil Procedure of this State, which governs in law cases in United States courts in the absence of any rule or established practice to the contrary, provides no authority for a motion requiring a plaintiff to elect. He is entitled to set forth his cause of action from as many different standpoints as he may have theories of his case and may present his evidence upon all of his different theories. Upon instructing the jury, however, the court adopts what it conceives to be the true theory and charges the jury accordingly.

This procedure is obviously in the interest of justice. If counsel, at the opening of a trial, should be arbitrarily required to state the theory upon which his case will be presented and should be bound by that theory, cases would ofttimes be de-

termined adversely to plaintiff, not upon the merits, but because counsel had adopted an erroneous theory. The only safe way to secure a determination of any case upon the merits is to permit the complaint to be as broad as any possible theory of the case would justify, leaving it to the court, after the introduction of the evidence, to adopt the true theory in its instructions to the jury.

This was the practice followed in these cases. The court declined to require plaintiff to elect, but in its instructions fully protected both parties in all their legal rights and confined the issues within their appropriate legal limits.

III.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Plaintiff in error urges that its motion for nonsuit should have been granted because of alleged insufficiency of the evidence. There is absolutely nothing in this point.

It is settled beyond possible controversy that an employer is bound to use ordinary care to provide his employee with a safe place to work. Of course certain employments are inherently dangerous, and the law does not require an employer to eliminate all dangers which necessarily attend a particular employment. But the employer is required to make an employment which is necessarily dangerous a

reasonably safe employment so far as that can be accomplished. It seems paradoxical, but is nevertheless true that, from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe.

It is not contended in these cases that the employer should have eliminated all danger attending mining operations. But it is earnestly urged that the obligation rested upon the employer to use reasonable care to provide its employees with as safe a place to work as conditions would permit.

In these cases the employer had, no doubt in the interest of safety, provided a "missed-hole" man whose duty it was to examine the faces of drifts before crews were set to work to discover and shoot "missed holes". The employees knew of the employment and duties of the "missed-hole" man, and conducted themselves accordingly. The "missed-hole" man made a casual inspection of the face of the particular cross-cut in question and found no "missed hole", although "missed holes" were easily discoverable by any person looking for them. His first inspection was only partial, as the muck had not been entirely removed. Subsequently, and shortly before the accident, and when the Whitsett boys had been set at work drilling the hole which set off the unexploded blast, the "missed-hole" man, Yokum, was present, but made no inspection of the particular cross-cut which he had before left uninspected. The evidence for the plaintiff in error is

itself to the effect that "missed holes" in the bottom of a drift are more difficult to discover than those in the upper part of the face. Yokum's first inspection was only of the upper part of the face, and he therefore left uninspected that part where the "missed holes" were harder to locate. It might be assumed, if any duty rested upon the miners at all, that the "missed holes" easiest of discovery would be left to them. But certainly the "missed-hole" man should be expected to locate the obscure ones, because that was the very purpose of his employment. Therefore, it was a question for the jury to determine whether Yokum's efforts, such as they were, to discover "missed holes" on the particular face in question constituted reasonable care.

It is submitted that he was grossly negligent. The explosion is indubitable proof that the "missed hole" was there. The evidence is uncontradicted that it was comparatively easy of discovery to any one searching for it. Yokum failed to discover it. Whether his inspection was sufficiently thorough or not was, therefore, a question for the jury. The verdict means that his inspection was not that of an ordinarily prudent person, and such a finding will not be disturbed by this court.

The rule contended for by plaintiff in error has no application to these cases. It is true that where a place of employment is constantly changing through the efforts of the employee himself while performing his duties, and where the employee him-

self thus creates a condition of danger, the obligation of an employer to furnish a safe place to work is considerably modified. But this is not such a case. This was not the regular place of employment of the Whitsett boys. They, in common with all other employees in the mine, were set at work at different places at the discretion of the foreman. When they were put to work in a particular drift and required to drill holes in a particular face, the employer was bound to use ordinary care to see that the particular drift or place was safe at that time. If, during the course of their work, the employees themselves made it unsafe the principle contended for might apply.

In this case the employees had absolutely no discretion as to where or how they would work. The very hole which did the damage was already started when they went to work. Hall, the foreman, assisted them in setting up their machine and directed them to continue drilling the hole which was already begun. Therefore, the general rule clearly applied, namely, that the obligation rested upon the employer to make that particular spot reasonably safe when setting men at work there. As they had been working but a few minutes when the explosion occurred, there was no opportunity for them, by changes produced by their own efforts, to make their place of employment unsafe. Under these circumstances it seems clear that the ordinary rule as to the obligation of employers applies, and that

the rule contended for by plaintiff in error has no application.

Rocky Mountain Bell Telephone Co. v. Bassett, (Ninth Circuit) 178 Fed. 768;

Reid Coal Co. v. Nichols, (Tex.) 136 S. W. 847;

Corby v. Missouri & K. Tel. Co., (Mo.) 132 S. W. 712;

Allen v. Bell, (Mont.) 79 Pac. 582.

The obligation resting upon the employer to use reasonable diligence to furnish his employee with a safe place to work is non-delegable. This proposition is so well established that the citation of authorities is unnecessary. Yokum, in carrying out his duties, was the vice-principal or agent of the employer and his negligence was the negligence of the employer.

It may also be remarked that an obligation rested upon the foreman, as the representative of the employer, to provide the employees with a safe place to work; and in the absence of a sufficient inspection by Yokum, the foreman should have inspected and discovered the "missed hole". Hall admits that he set the Whitsett boys at work, but made no careful inspection of the face of the cross-cut. Both of the employer's representatives on the ground, therefore, were negligent, and it is submitted that the jury's finding of negligence should not be disturbed.

IV.

AS TO ALLEGED ERRORS NUMBERED XLIV AND XLV.

Plaintiff in error contends that the court should have instructed the jury as to the rule obtaining where the place of employment is constantly changing owing to the efforts of the employee himself. As already appears, this principle has no application in this case. The face of the cross-cut in question was not made dangerous by the Whitsett boys. If it was made dangerous by other employees who had worked there at some indefinite time previously, the obligation rested upon the employer to make it reasonably safe before setting the Whitsett boys at work there. This the empoyer failed to do. The accident happened because of this failure, and not through any change in conditions brought about by the progress of the work.

It was clearly proper for the court to refuse to instruct the jury upon a proposition of law which was not under any conception of the facts involved in the case. See, also, in this connection, the cases last above cited.

Furthermore, it is submitted that the instruction as proposed did not contain an accurate statement of the principle contended for by plaintiff in error.

V.

AS TO ALLEGED ERROR NUMBER XXVI.

There was no reason why the testimony as to the incompetency of Yokum should have been stricken

from the record. It was in issue under the pleadings, and, therefore, the evidence was properly received. The court's only duty in the premises was to give the jury appropriate instructions on the subject of Yokum's incompetency. This was done and the question of Yokum's incompetency was thus left to the jury where is belonged. If the evidence of his incompetency was insufficient to go to the jury plaintiff in error should have requested that the jury be so instructed. A motion to strike out was clearly not the proper remedy.

VI.

ALLEGED ERRORS XLIX, L AND LI.

The evidence of defendant in error as to Yokum's duties as "missed-hole" man was amply sufficient to show that he should have inspected the particular face in question before the Whitsett boys were set at work. This being so, it is well established that the employees had a right to assume that he would perform his duties in that regard. This particular question has frequently been considered in street railroad cases. In *Scott v. San Bernardino Valley Traction Co.,* 152 Cal. 604, where the relative obligations of motormen and drivers of vehicles on the street were under discussion, it was held that while the obligation rested upon the driver of vehicles to use reasonable care for their own safety, they were nevertheless entitled to assume that motormen would

exercise the same degree of care for the safety of the drivers.

This is the precise question here involved. Assuming that any duty rested upon the Whitsett boys to examine the face for "missed holes", a corresponding duty rested upon the employer to do the same thing, and under the doctrine of the Scott case, the Whitsett boys were entitled to assume that the employer's duty in that regard would be performed. The instruction complained of as Error XLIX was, therefore, clearly correct.

The refusal to give instructions assigned as errors L and LI is plainly justifiable. Both instructions ignore the duty of the employer altogether, stating in effect that if the Whitsett boys could not, by the exercise of ordinary care, have discovered the "missed hole", there could be no recovery. These instructions mean that if the plaintiff in error could have discovered the "missed hole", by the exercise of reasonable diligence, it were excused if the Whitsett boys could not have discovered them. There is no necessity for argument as to the impropriety of any such instructions.

VII.

AS TO ALLEGED ERROR NUMBER XLVIII.

The instruction considered was refused, not only because it is inaccurate in many respects, but be-

cause the court very fully and correctly instructed the jury on the subject of Yokum's incompetency, and explicitly stated the rules applicable thereto (Record, pp. 119, 120, 121).

Furthermore, if there should be error in refusing this particular instruction it could not have operated to the prejudice of plaintiff in error. The evidence was amply sufficient to establish the negligence of plaintiff in error without reference to any incompetency on Yokum's part. Were he ever so sober he would still have been negligent in failing to perform the duty of inspection imposed upon him. As the evidence was sufficient to establish the employer's liability without reference to Yokum's incompetency, this question becomes practically a moot or abstract one in the case.

The next instruction discussed (Brief, p. 68) is incorrect. It sets forth, in substance, that if Yokum had examined the face of the cross-cut and had failed to discover the missed hole, and the Whitsett boys had also failed to discover it, they could not recover. This instruction leaves out the question of *ordinary care.* It is further objectionable because it states, bluntly, that if the Whitsett boys failed to discover the missed shot there could be no recovery. This means that no matter how careful their inspection might have been, or how insufficient and casual Yokum's might have been, the boys must lose. This is not the law. Assuming that a like duty rested

both upon the employer and employee, it is the law that if the employer did not use ordinary care to discover the missed hole and the employee did not, then *if the employee's failure in that regard proximately contributed to his injury* he cannot recover. This, manifestly, is a very different statement from that contained in the rejected instruction. In addition to being erroneous in the particulars mentioned, it entirely omits the question of proximate connection between the negligence of employees and the injuries and death complained of.

In conclusion, it is urged that the evidence shows without substantial conflict that Fred Whitsett sustained serious injuries and Frank Whitsett met his death through gross negligence on the part of plaintiff in error. In view of the evidence adduced both verdicts are exceedingly small. The court very fully, carefully and correctly instructed the jury upon every possible feature of the case. A new trial would probably result more advantageously to the defendant in error than to the plaintiff in error, because upon such trial the strong probabilities are that the verdicts would be much larger. It would seem, therefore, that plaintiff in error might let well enough alone. However, although the verdicts are small and plaintiff in error appears to be contending against its own ultimate interest, the defendant in error, in order that this litigation may be brought to an end, urges the affirmance of the

judgment appealed from even though dissatisfied with it.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

WILLIAM M. CANNON,
Attorney for Defendant in Error.